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U.S. Department of Labor

Office of Administrative Law Judges
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CASE NO.: 2000-LHC-2851

OWCP NO.: 07-150633

IN THE MATTER OF:

JOHNEL DYER,

Claimant

v.

BOLLINGER SHIPYARD, INC.,

Employer

AMERICAN LONGSHORE MUTUAL ASSOCIATION, LTD.,

Carrier[1]

APPEARANCES:

R. Scott Iles, Esq.

For the Claimant

Robert S. Reich, Esq.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

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[1] The caption appears as amended at the hearing by adding American Longshore Mutual Association, Inc. as Carrier. (Tr. 5).

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Johnel Dyer (Claimant) against Bollinger Shipyard, Inc. (Employer) and American Longshore Mutual Association, Ltd. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on February 14, 2001, in Lafayette, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered nine exhibits while Employer/Carrier proffered 15 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on July 30, 1998.

2. That Claimant's injury occurred during the course and scope of his employment with Employer. (Tr. 10).

3. That there existed an employee-employer relationship at the time of the accident/injury; Claimant was employed by Bollinger Shipyards, Inc. as an electrician on July 30, 1998.

4. That the Employer was notified of the accident/injury on July 30, 1998.

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

5. That a Notice of Controversion was filed on October 9, 1998.

6. That an informal conference before the District Director was held on April 1, 1999.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether an intervening and/or superceding event aggravated or exacerbated Claimant's work-related injury. (Tr. 10).

3. Reasonableness and necessity of treatment and/or surgery recommended by Dr. Blanda.

4. Claimant's average weekly wage.

5. Whether benefits under the Act are proscribed by Claimant's acceptance of unemployment benefits.

6. Date of maximum medical improvement.

7. If surgery is authorized, whether Claimant is entitled to additional vocational rehabilitation training. (Tr. 15-16, 33).

8. Medical benefits pursuant to Section 7 of the Act.

9. Whether Claimant was discriminatorily laid off and not recalled to employment in violation of Section 48(a) of the Act.[3] (Tr. 119-121).

10. Attorney's fees, penalties and interest.

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[3] During the hearing, Claimant formally withdrew his allegation of wrongful termination. (Tr. 121).

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified that he was born in Thibodeaux, Louisiana on July 9, 1951 and has lived in Louisiana for most of his life, less a few years during which he lived in Atlanta, Georgia. He graduated from high school in Patterson, Louisiana in 1969. (Tr. 39).

Claimant entered the United States Army in February 1971 and served until March 1973 at which time he had earned the rank of E-2. (Tr. 40). Following discharge from the Army, he attended Young Memorial Vo-Tech in Morgan City, Louisiana where he studied communications electronics. Before completing the course work, Claimant left in order to work, but later returned to vocational school and completed his studies sometime between 1981 and 1984 earning an FCC license in communications electronics. (Tr. 39, 60).

Before his employment with Employer, Claimant was employed as an electronics technician, primarily in the offshore industry. During that time, he had been required to lift at least 100 pounds. (Tr. 40).

From January 1996 through June, 3, 1998, immediately preceding his employment with Employer, Claimant was employed by Oceaneering International Incorporated where he worked as an electronics technician on an ROV, usually for 28 days but for as long as 60 days, at a time. (Tr. 40-41). Claimant testified that he was in “great condition” during the time that he worked for Oceaneering. (Tr. 41).

When Claimant applied for employment with Employer as a marine electrician, he was required to undergo a pre-employment physical examination, including a back x-ray. He testified that he had no back problems before his employment with Employer. (Tr. 41-42).

As an electrician with Employer, Claimant worked at the “dry docks” at Bollinger-Morgan City. (Tr. 43). At the dry dock yard, his job duties included working on computerized machines in the machine shop, changing light bulbs, repairing welding

machines and tending to other electrical or electronic needs. Claimant was required to lift as much as 100 pounds or more. (Tr. 42).

On July 30, 1998, Claimant punched in and started work around seven o'clock in the morning. (Tr. 43). Claimant was to help connect a 200 foot shore line between a vessel and a disconnect line, which was approximately 200 feet away from the vessel. (Tr. 45). Claimant testified that a shore line is an electrical cable and, in this particular case, was made up of "four conductors of four-aught electrical wire," weighing ten to fifteen pounds per foot. (Tr. 44-45).

Connecting the cable to the vessel and to the "disconnect" required stretching the cable to extend 200 feet, connecting it to the disconnect on land and connecting it to the power room in the vessel. A crane was used to lift the cable up to the vessel, but as the crane lowered the cable, it had to be "pulled up" under a catwalk and onto the boat. (Tr. 44-45).

Around nine o'clock that morning, as Claimant was attempting to pull the cable under the catwalk, he experienced pain in his lower back. (Tr. 43, 45, 47). At the time, Claimant believed that he had "pulled a muscle or something" but because his back pain continued, he reported it to the first-aid office around noon on the day of the incident. (Tr. 45, 48). At that time, and for a couple of days following, the attendants in the first-aid office applied heat to the area of pain and gave Claimant aspirin. (Tr. 45).

Claimant testified that over the following weekend, his pain worsened. Upon returning to work on Monday, he reported his condition had not improved and requested to see a doctor. Claimant's request was granted by the first-aid office. He did not request a particular doctor. He was sent to Dr. Daniels in Morgan City. (Tr. 46).

During his visit to Dr. Daniels, Claimant was x-rayed and given medication for his pain. Claimant testified he was told by Dr. Daniels that he had pulled a lumbar muscle. (Tr. 48). Dr. Daniels sent him back to work with a slip for light duty. (Tr. 49).

Claimant testified that upon returning to work, he sat in the first-aid station, under the instruction of the first-aid worker. He was paid for eight hours of work per day for the

days that he remained in the first-aid station. (Tr. 49).

Claimant had subsequent visits to Dr. Daniels, but did not feel his pain was improving. After his last visit with Dr. Daniels, Claimant made a request to the first-aid station to see a back specialist. (Tr. 49). When asked who he would like to see, Claimant requested Dr. Fitter in Morgan City, but was told Dr. Fitter did not have an available appointment within the next four or five months. (Tr. 49-50). Claimant was then asked to see Dr. Accardo in Franklin, Louisiana, and he agreed. (Tr. 50).

Claimant visited Dr. Accardo in August 1998, at which time Dr. Accardo reviewed Claimant's x-rays and determined that Claimant had a pulled lumbar muscle. Dr. Accardo did not change Claimant's work status at that time. (Tr. 50). He testified during that visit and on several subsequent occasions, Dr. Accardo told him the best thing he could do for his injury was to return to work and the injury "would work itself away." (Tr. 51).

Upon returning to work, Claimant was told he would not receive pay for eight hours of work a day while he sat in the first-aid station, but rather, he would receive four hours of pay per day. He testified on his next visit to Dr. Accardo, he asked to be sent back to full duty. Claimant testified he wanted to try to work because he could not live on four hours of pay per day. (Tr. 51). He was released from light duty by Dr. Accardo as of August 19, 1998. (Tr. 83; EX-7, p. 13). Claimant returned to full duty work with Employer, but testified that he wasn't allowed to do "anything" for the next day and a half. On the second day after returning to "full duty," Claimant was given a pink slip and was told that he was laid off, effective August 21, 1998. (Tr. 51; EX-9, p. 1).

The day after being laid off by Employer, Claimant applied for unemployment compensation with the State of Louisiana. He testified that because Dr. Accardo told him the best thing to do was to return to work, he did not discuss with the unemployment office what type of work he was able to do. (Tr. 54). On cross-examination, Employer's counsel referred to Claimant's unemployment application regarding whether there was any reason, such as illness or disability, why Claimant could not work at that time, next to which Claimant had checked "no". When questioned by Employer's counsel about why he had indicated

there was no reason for which he was unable to work, Claimant testified he answered "no" because he had been told by Dr. Accardo that the best thing to do would be to return to work. (Tr. 74).

Claimant testified that he received two or three unemployment checks over the span of a month. (Tr. 54). On cross-examination, it was established that Claimant had received up to "nine" unemployment checks. (EX-12, p. 3; Tr. 76). Claimant testified he did not apply for a full year of unemployment benefits because after receiving a few checks, he felt that he could not work due to pain in his back. He was told by the unemployment office that if he was unable to work, he was not eligible for unemployment benefits. (Tr. 78, 109).

Claimant testified that shortly after being laid off, he saw an ad in the newspaper regarding a job at Swift Shops. He applied for the job and, at that time, informed Swift Shops he was seeing Dr. Accardo and was scheduled to see another doctor, Dr. Blanda. Swift Shops informed Claimant he was required to present releases from both doctors before he would be allowed to work. (Tr. 53). Claimant testified that during the time he received unemployment benefits, he did not seek employment with any employer other than Swift Shops. (Tr. 55).

Although Claimant had continued to see Dr. Accardo, he testified he felt that he was not improving as a result of these visits. Consequently, Claimant made a request to the first-aid station to see a doctor of his choice, Dr. Blanda, whom Claimant had found in the yellow pages. Claimant did not recall whether this request was made before or after his lay off, but the request was granted. (Tr. 51-52).

On September 24, 1998, when Claimant first saw Dr. Blanda, approximately two months after the accident, he reported pain in his lower back. Dr. Blanda ordered several diagnostic tests, but Claimant underwent only those tests that were approved by Employer. (Tr. 55). Dr. Blanda also recommended surgery, but surgery was not approved by Carrier. Claimant testified that he was still interested in having the recommended surgery. (Tr. 57-58). Claimant testified that he had last seen Dr. Blanda in August 2000. (Tr. 107).

Claimant testified that he was involved in an automobile accident in January "1999," in which a motorcycle struck the car

that he was driving in the parking lot of a shopping center. He testified that, as a result of the accident, there was damage to the rear driver's side door. (Tr. 56). On cross-examination, Employer noted a discrepancy between Claimant's answers to questions concerning the date of the car accident. During his testimony at the hearing and in his prior deposition testimony, Claimant answered that the accident occurred in January 1999. (Tr. 56; EX-14, p. 61). The hospital records, Claimant's Exhibit No. 9, reflect and Claimant testified later in the hearing, that the accident occurred in January 1998. (CX-9 pp. 2-3; Tr. 89). Although Claimant visited Franklin Foundation Hospital after the accident, he testified that he was told he was fine and he did not believe he had received any medication or tests. Claimant testified he did not experience any additional or aggravated back pain as a result of this accident. (Tr. 57).

Claimant was seen by Dr. Cenac in February 1999, apparently at the behest of the Social Security Administration and was released to unrestricted duty. (Tr. 80).

As of February 2001, Claimant had not worked since his employment with Employer ended in August 1998. Claimant testified that he has received social security disability since July or August 2000 based on his lower back injury. (Tr. 58). Claimant testified he has no health problems, other than his lower back pain, that would prevent him from applying for employment. (Tr. 59).

Claimant also testified he has worked as a Cable TV installer and has operated ROVs (remote operated vehicle). (Tr. 60). He explained that an ROV acts as a robot and is sent below a rig to inspect such things as the wellhead and the riser pipes, while being controlled by a three-man crew from a control room on the rig. Claimant explained the job is mostly sedentary, but may require work "three or four days straight." (Tr. 60-61).

Claimant testified he fractured his ankle in 1984 while working offshore and received a $100,000 settlement. As a result of that injury, he was offered vocational rehabilitation through study at USL. (Tr. 63). Claimant did not recall whether or not he was restricted to light duty at that time. (Tr. 65; EX-14, p. 24). Claimant attended USL for almost two years and studied telecommunications engineering. Claimant testified he dropped out of school to return to work because he was concerned about having enough money to support his family. (Tr. 63-64).

Before Claimant began working offshore, he worked as a warehouseman at Harvey Supply Company. Claimant's job duties included boxing and shipping supplies. (Tr. 66). Claimant also worked as a warehouse supervisor at IC Electrical Supply. As a supervisor, Claimant was required to fill out orders and oversee shipping and receiving. Claimant testified that this was not exclusively a desk job. (Tr. 66-67).

Claimant also worked for Service Machine and Shipbuilding operating a forklift, and eventually worked his way up to a supervisor, and then to a buyer in the purchasing department. As supervisor, Claimant supervised all employees in the purchasing department with the exception of his own supervisor. (Tr. 68). For three of the six years that Claimant worked at Service Machine, he was a buyer in the purchasing department. Claimant testified that this position was solely a desk job and for this reason he became bored with the job and eventually left. (Tr. 69).

Claimant acknowledged that through an informal conference with the district director, an independent doctor, Dr. Lea was scheduled. Dr. Lea examined Claimant and opined that surgery would not be beneficial for Claimant's condition and approved Claimant for sedentary work. (Tr. 99-100).

Claimant testified he believed that he was capable of returning to school if he was able to get up from his seat and walk around occasionally. (Tr. 102). He further stated he could not sit or stand "too long" because his back hurts. (Tr. 103).

Claimant testified he knew that job openings had been identified by vocational specialist Dr. Stokes and were available to him, but he had not pursued employment because he felt his back pain prevented him from working. (Tr. 104).

Derald Mazerac

Derald Mazerac, who is employed by Employer as a superintendent of the repair division of Bollinger-Morgan City, testified at the hearing that his duties as superintendent include supervision of the employees at the repair division as well as hiring and firing those employees. Mr. Mazerac testified he was employed at this position when Claimant worked at the yard. (Tr. 124).

Upon request, Mr. Mazerac reviewed a job description of an electrician, introduced into evidence by Employer. (EX-13). Mr. Mazerac testified that the description presented was applicable to an electrician position in the new construction division, not the repair division where Claimant had worked. (Tr. 124). The repair division electrician was involved more in maintenance by "keeping the welding machine repaired, flux core boxes and hooking shore power on the vessel and maintaining the dry dock pumps and controls and the maintenance in the yard." He explained the lifting requirements were less in the repair division than in the new construction division. (Tr. 125).

Mr. Mazerac testified electrician positions became available at some time after Claimant had been laid off by Employer, that these job opportunities were advertised in the newspaper, and would have been available to Claimant had he inquired. (Tr. 126).

Mr. Mazerac testified Employer makes accommodations for employees with restrictions and that some electrician/electronic positions require no heavy lifting. According to his testimony, some positions, including a position in which Claimant had previously worked, simply require working on machines at a work table but pay a wage equivalent to Claimant's pre lay-off wage. (Tr. 127).

On cross-examination, Mr. Mazerac agreed that since the time of Claimant's lay off by Employer, no assessment of his employability as an electrician at Bollinger-Morgan City, given his physical restrictions and use of narcotic pain medications had been made by Employer. (Tr. 128).

Dr. Larry Stokes

At the hearing on this matter, Dr. Larry Stokes testified as an expert in the field of vocational rehabilitation. He met with Claimant on May 15, 2000 and prepared a vocational report dated June 7, 2000. (Tr. 130; EX-2). Dr. Stokes administered an achievement test, intelligence test, and an interest inventory during his meeting with Claimant. He found Claimant's scores on the achievement test were much higher than most high school graduates and higher than most college graduates who Dr. Stokes has tested. (Tr. 134). Claimant's intelligence test returned an above average score. Dr. Stokes testified that the interest inventory showed Claimant's interest in electronics,

particularly computers. (Tr. 135). Dr. Stokes opined that Claimant is capable of returning to work as an electrician working in the shop at Bollinger-Morgan City, as he previously had, if accommodations were made to allow him to work within his restrictions. (Tr. 136).

Dr. Stokes testified that according to the reports of Dr. Accardo, Dr. Cenac and Dr. Daniels, Claimant could return to work at any occupation and therefore, has no need for rehabilitation and has no loss of wage-earning capacity. (Tr. 137). Even considering Dr. Lea's restrictions, Dr. Stokes believed that Claimant could return to work at a substantial wage. (Tr. 138).

Dr. Stokes gave several examples of the types of jobs that were within Claimant's capabilities. (Tr. 138). For a electronics technician, requiring light duty, Dr. Stokes found 24 jobs available per year in the Franklin, Louisiana area, earning an average weekly wage of $600. Dr. Stokes also identified stock control positions, which are considered sedentary and are available at a rate of 99 per year in the area of Claimant's residence. The average weekly wage for such a position is $295. (Tr. 139). These are indicative of alternative occupations and do not represent particular jobs. (Tr. 162).

Additionally, Dr. Stokes identified a position as an electronic parts sales representative, for which the average weekly wage is $910 for light duty work. The position of a purchasing agent was also identified. For this job, requiring light duty, thirteen jobs were found, at an average weekly wage of $490. At the same wage, there is the position of inspector, for which there were nine jobs. (Tr. 139).

Dr. Stokes conducted a labor market survey to determine what positions were available in Claimant's area of residence. To determine availability, Dr. Stokes uses a three-prong test which asks (1) whether a position was available during the time that Claimant may have looked for a job, (2) whether the job was available when he conducted the market survey and (3) whether the job is projected to be available in the future. A full-time sedentary position (involving mostly sitting) in industrial rentals and sales with a hourly wage of between $7.25 and $23.00 was available, meaning that applications were being accepted and people were being hired at the time of the survey. (Tr. 143; EX-

2, p. 7).

A light duty, full-time job in electrical repair was identified. This position paid $10.00 to $13.00 per hour and was open and available. A "profile" of Claimant was presented to the potential employer, who told Dr. Stokes that accommodations would be made for Claimant's specific needs, as presented in the profile. (Tr. 143-144; EX-2, pp. 7-8). The record does not reflect the nature or details of the "profile" presented to prospective employers.

Dr. Stokes identified another full-time position as a computer network technician that required completion of a seven-month computer networking course at the cost of approximately $8,999. (Tr. 144). He considered this job sedentary to light, and paid $10.00 to $15.00 per hour. The job was open and available and the potential employer explained that accommodations, specific to Claimant, would be made, including allowing Claimant to sit and stand as he felt appropriate. (Tr. 145; EX-2, p. 8).

Dr. Stokes also identified a position as an electronics technician which he classified as light to medium duty, paying $8.00 to $15.00 per hour. Although this job required 75 pounds of lifting, Dr. Stokes explained that he spoke to the employer regarding this position and was told that accommodations would be made for any restrictions, including Claimant's ten-pound lifting restriction. This position had been filled since the survey was conducted but Dr. Stokes explained the employer was interested in Claimant's resume as the current employee may not "work out." (Tr. 145-146; EX-2, p. 8).

Another full-time position, entitled administrative assistant, was more of a sales position, according to Dr. Stokes. This position was open, sedentary, but allowed for alternately sitting and standing when needed, and paid $6.00 to $6.50 per hour. The position required lifting of no more than five pounds. (Tr. 147-148; EX-2, p. 8).

Dr. Stokes explained that an alternative option for Claimant would be to return to college. Considering his previous studies, Dr. Stokes explained that Claimant would need approximately 60 hours, or two years, of credit to earn his Bachelor's degree in electronic engineering. (Tr. 140). Claimant could also complete a course in computer network engineering at a technical college in New Iberia or Morgan City. Dr. Stokes

testified that he would expect Claimant to be able to earn at least $12 per hour upon completing the course and could potentially earn $15 per hour within a short period of time. (Tr. 141).

Dr. Stokes opined that a position in the field of electronic engineering or computer network engineering would be within Claimant's physical, educational and intellectual capabilities. However, he also opined that Claimant is capable of returning to some sort of work without additional education. (Tr. 142).

On cross-examination, Dr. Stokes acknowledged that Employer/Carrier retained him to conduct a vocational rehabilitation assessment of and labor market research for Claimant to determine employability and wage earning capacity. (Tr. 150-151, 172). He agreed that Dr. Lea's restrictions of Claimant "really fall into the sedentary category." He described light jobs in his survey because three other physicians did not eliminate any physical category in opining that Claimant was totally unrestricted. (Tr. 155). He stated he used "the most restrictive of capabilities" attributed to Claimant, which were assigned by Dr. Lea, in searching for job opportunities. (Tr. 162). Dr. Stokes further confirmed that his labor market survey, in which he identified five potential jobs suitable for Claimant, does not reflect the specific prospective employers. (Tr. 165).

The Medical Evidence

Dr. Walter H. Daniels

Claimant first saw Dr. Daniels on August 3, 1998, just days after the accident. (EX-6, p. 2). At that time, Claimant complained of low back pain. Dr. Judith Kelsey, the radiologist who reviewed Claimant's x-ray dated August 1, 1998, found no significant osseous or soft tissue abnormality. (EX-6, p. 7). Upon examination, Dr. Daniels diagnosed Claimant with a lumbar sprain and restricted Claimant from doing work that included lifting, bending or stooping. (EX-6, pp. 2, 4). Claimant visited Dr. Daniels again on August 10, 1998, at which time Dr. Daniels reiterated Claimant's "light work" restriction. (EX-6, p. 5). On August 17, 1998, Claimant returned to Dr. Daniels explaining that his pain had not improved. (EX-6, p. 3). Dr. Daniels approved claimant for regular work but recommended that he see Dr. Nick Accardo. (EX-6, p. 6).

Dr. Nick J. Accardo, Jr.

Claimant presented to Dr. Accardo with continuing complaints of low back pain with occasional pain and numbness into his legs. Upon examining Claimant on August 18, 1998, Dr. Accardo found no evidence of deformity or tenderness in Claimant's spine and no restricted range of motion. Claimant's straight leg raise tests were negative. Dr. Accardo concluded that Claimant was neurologically intact. (EX-7, p. 2). Dr. Accardo gave Claimant a note to return to normal duties at work and prescribed Lodine, an anti-inflammatory medication. (EX-7, pp. 2-3).

On August 24, 1998, Claimant returned to Dr. Accardo and reported no improvement with the Lodine. Claimant complained of pain across his low back if he sits or stands too long with hurting in his legs at times. Dr. Accardo found no muscle spasm or tenderness. He again found Claimant to be neurologically intact with low back pain. Dr. Accardo switched Claimant's medication to Ultram, which Dr. Accardo indicated is a pain medication. (EX-7, p. 3).

On August 31, 1998, Dr. Accardo again found no evidence of deformity of Claimant's spine, no tenderness, and no muscle spasm. Claimant's straight leg raise tests were negative. Dr. Accardo again found Claimant to be neurologically intact with low back pain. (EX-7, p. 4).

On September 14, 1998, Claimant reported pain in the midline of his sacrum and occasional pain up his spine to the base of his neck. Upon examination, Dr. Accardo found no deformity of the spine, normal range of motion and reflexes and no tenderness. Claimant's straight leg raise tests were negative. Dr. Accardo again found Claimant to be neurologically intact with low back pain. Dr. Accardo prescribed Relafen, an anti-inflammatory medication. (EX-7, p. 5).

On September 21, 1998, Claimant reported no change in his condition. Claimant felt that the prescribed medication had not helped him. Dr. Accardo discontinued the medication. Although Dr. Accardo again found no deformity of the spine and no muscle spasm, he did note tenderness in the lower lumbar spine. Claimant's straight leg raise tests were negative. (EX-7, p. 5). Dr. Accardo again found Claimant to be neurologically intact with low back pain. Dr. Accardo gave Claimant a note approving

him for normal duties as an electrician at Swift Ships. Dr. Accardo noted that he believed that Claimant just needed time for his body to heal. (EX-7, p. 6).

On November 2, 1998, Claimant reported pain from about the first lumbar vertebra to the end of his tailbone as well as weakness in his left leg that caused it to "give way" unexpectedly. Claimant stated that he was in physical therapy three times a week. He told Dr. Accardo that the therapy eased his pain temporarily. Upon examination, Dr. Accardo found no deformity of the spine, normal range of motion and reflexes and no tenderness. Claimant's straight leg raise tests were negative. Dr. Accardo again found Claimant to be neurologically intact with low back pain. Claimant informed Dr. Accardo that he had seen Dr. Blanda and had an MRI performed. Claimant explained to Dr. Accardo that he was unable to receive unemployment compensation because Dr. Blanda had not cleared him for work. Dr. Accardo requested Claimant to get a copy of the MRI from Dr. Blanda and bring it to his next visit with Dr. Accardo. (EX-7, p. 7).

On December 14, 1998, Dr. Accardo reviewed the October 13 MRI with Claimant, explaining that his spine appeared normal. Claimant told Dr. Accardo that Dr. Blanda had discontinued therapy because Claimant believed it had not helped him and that Dr. Blanda had recommended a myelogram. Dr. Accardo noted that Claimant reported pain "occurs to him at the lumbosacral junction when it occurs," but was pain free on this visit. Claimant experienced pain during the visit when pointing to his lumbosacral junction. Straight leg raising tests were negative bilaterally. Claimant also reported occasional numbness in his left leg that would last for a few minutes. Dr. Accardo still found Claimant to be neurologically intact with low back pain. Dr. Accardo advised Claimant to return to work and to his normal activities, as Dr. Accardo believed this would improve Claimant's condition. (EX-7, p. 9).

In an undated letter to Mr. Will Scheffler, which was apparently dictated on January 13, 1999, Dr. Accardo opined that he did not think a myelogram or CT scan would be necessary for Claimant "since the MRI scan was completely normal" and believed that Claimant was near the point of maximum medical improvement. (EX-7, p. 10).

On or about June 25, 1999, Dr. Accardo reviewed the report of Dr. Christopher Bodin who interpreted the lumbar spine

myelogram and post-myelogram CT of June 3, 1999 on Claimant. He confirmed that the report indicated Claimant had "a mild broad based bulge in the disc at the L4-L5 level," but there was no evidence of spinal or foraminal compromise. He noted a preference to personally review the films, but reiterated that nothing in the report findings would change his opinion expressed in December 1998. (EX-7, pp. 11-12).

Dr. Louis C. Blanda, Jr.

Medical records of Claimant's care from Dr. Blanda were submitted into evidence as Claimant's Exhibit No. 2. (Tr. 12). Dr. Blanda first saw Claimant on September 24, 1998, approximately two months after Claimant's reported accident at work. At that time, Dr. Blanda reported that Claimant complained of low back pain or aching as well as referred pain through the posterior thighs and calves and into the feet. (CX-2, p. 13). Upon reviewing x-rays of the lumbar spine dated August 3, 1998, Dr. Blanda noted that they appeared normal. He noted upon physical examination that a straight leg raise caused Claimant pain and a pulling sensation in the posterior legs. Dr. Blanda noted tenderness but no spasm of the lumbosacral spine and that Claimant was able to heel and toe walk without difficulty. Dr. Blanda recommended physical therapy as well as a lumbar MRI to rule out disk herniation or nerve root compression. Dr. Blanda also placed Claimant on Margesic. (CX-2, p. 14).

On October 20, 1998, Dr. Blanda reported that Claimant's lumbar MRI was negative for a herniated disk. However, he did note a "questionable" bulge at L5-S1, "but no desiccation." Dr. Blanda recommended Claimant continue physical therapy and refrain from work. (CX-2, p. 12). The interpretation of Dr. J.J. Laborde, radiologist, was a "normal study" with no evidence of abnormality and no evidence of any abnormal disc bulge, herniation or protrusion with normal hydration and no evidence of nerve root displacement or compression. (EX-3, p. 1).

On December 1, 1998, Claimant returned to Dr. Blanda with continued back and left leg pain on examination, spasm was palpable and a positive straight leg raising test on the left was present. Dr. Blanda noted that therapy had not improved Claimant's condition. Dr. Blanda recommended a myelogram and CT scan for further evaluation. (CX-2, p. 10).

On January 19, 1999, Dr. Blanda reported that Claimant's condition had not improved and that Claimant had not yet received the myelogram or CT scan, which Dr. Blanda felt were still necessary. Upon physical examination, Dr. Blanda found a palpable spasm, a positive straight leg raising test as well as weakness in Claimant's left foot. Heel to toe walking was now difficult for Claimant. In addition to the continued recommendation for the myelogram and the CT scan, Dr. Blanda recommended EMGs of the left leg. Dr. Blanda also prescribed Lortab. (CX-2, p. 9b).

On February, 25, 1999, Claimant returned to Dr. Blanda, but had not yet received the recommended tests because they had been denied by Carrier. Claimant reported additional pain in his hips and rectal area. Dr. Blanda referred Claimant to "UMC" until his legal matters were resolved. (CX-2, p. 9a).

On June 24, 1999, Dr. Daniel L. Hodges performed an EMG and nerve conduction study of Claimant's left lower leg. His findings indicate Claimant had left L5-S1 radiculitis. (CX-4, p. 34).

On July 1, 1999, Claimant visited Dr. Blanda after having received the recommended myelogram and CT scan. The radiologist, Dr. Bodin, who reviewed the tests, reported a mild bulging at L4-5 with facet hypertrophy. (See CX-1, p. 3). Dr. Blanda believed that there may be an "abnormality" at L5-S1 and wanted a second opinion from another radiologist, Dr. Laborde. Dr. Blanda also recommended a neurological evaluation by Dr. Domingue. Dr. Blanda advised Claimant not to return to heavy work. (CX-2, p. 8).

Claimant returned to Dr. Blanda on August 17, 1999. After reviewing Claimant's myelogram and CT scan, Dr. Laborde reported a central herniated disc at L5-S1 protruding into the anterior epidural space which "does not cause any significant distortion to the thecal sac." Dr. Laborde expressed disagreement with Dr. Bodin. (See CX-1, pp. 1, 3). Claimant's pain was the same and again there was a spasm palpable on examination. Dr. Blanda reported a positive straight leg raising test on the left as well as decreased sensation on the left. Dr. Blanda noted he was undecided about the appropriateness of surgery at this time. He again recommended that Claimant see Dr. Domingue, a neurologist, and return to physical therapy. (CX-2, p. 7b).

Claimant again saw Dr. Blanda on September 21, 1999 at which time he complained of continued back and left leg pain and numbness. Again, Dr. Blanda reported a palpable spasm and a positive straight leg raising test. Dr. Blanda also found atrophy of the left calf of one-half inch. Dr. Blanda noted that Dr. Domingue had agreed with the diagnosis of a herniated disk, but had not seen much nerve compression. (See CX-5, p. 35). Dr. Blanda recommended continued conservative care with physical therapy and noted that Claimant was on a no-work status. (CX-2, p. 7a).

On November 23, 1999, Dr. Blanda reported that Claimant's pain continued and had even grown worse. Dr. Blanda considered fusion as an option, given Dr. Domingue's report of a herniated disk. He wanted the opinion of Dr. Goldware, a neurosurgeon, before making a decision regarding surgery. (CX-2, p. 6).

On February 10, 2000, Claimant was seen by Dr. Blanda who reported that the appointment with Dr. Goldware had been denied by Carrier. Claimant's pain was the same. Dr. Blanda refilled Claimant's medication and opined that surgical correction of Claimant's condition was necessary. (CX-2, p. 5d).

On April 20, 2000, Dr. Blanda explained that without surgery, he had nothing new to offer Claimant. He noted that Claimant had seen Dr. Lea in Baton Rouge, but he did not have a copy of Dr. Lea's report. (CX-2, p. 5b).

On August 17, 2000, Dr. Blanda reported no improvement in Claimant's condition. Claimant now had three-fourths of an inch atrophy of the left calf, as compared to no atrophy on the initial exam, approximately two years prior. Positive straight leg raising and weakness in the left foot were present. Dr. Blanda recommended an updated lumbar MRI. (CX-2, p. 5a).

Dr. James N. Domingue

On September 14, 1999, Dr. Domingue, a neurologist, examined Claimant who complained of low back pain radiating down both legs, with worse pain in the left leg. Claimant also reported numbness, again worse in the left leg. (CX-5, p. 36). Dr. Domingue found no definite lumbar spasm and negative straight leg raising. Dr. Domingue found "no wasting or weakness" in the lower extremities but some hesitancy of initiation of movement of the "movers of the left ankles and toes." Dr. Domingue found

no definite neurological deficit at that time. (CX-5, p. 37).

Dr. Domingue later reviewed Claimant's MRI, myelogram, and post-myelogram CT scan. Dr. Domingue explained that all three studies indicated a small central disc herniation at L5-S1. Additionally, on the post-myelogram CT scan, he opined some ligamentum flavum hypertrophy at L4-5 and L5-S1 was evident but the nerve roots were not being compressed. He opined decompressing Claimant's nerve roots would not be beneficial. He explained he had no opinion as to the benefit of stabilizing L4-5 and L5-S1 with fusion, as this was outside of his area of expertise. He deferred that decision to Dr. Blanda. (CX-5, p. 35).

Dr. Domingue subsequently reviewed the EMG report of Dr. Hodges relating to left L5-S1 radiculopathy. He opined since Claimant is a diabetic the "scattered positive waves" could equally well represent a diabetic peripheral neuropathy or a sciatic neuropathy." (CX-5, p. 38).

Dr. Christopher E. Cenac

On February 22, 1999, Dr. Cenac, an orthopedic surgeon, examined Claimant who complained of low back pain and referred pain into the "right leg" with numbness. Dr. Cenac found no atrophy of "either leg above or below the knee joints," no muscle spasm and normal reflexes. Additionally, Dr. Cenac found Claimant's straight leg raise tests were negative and that Claimant was able to heel and toe walk, but complained of pain while doing so. He noted mild to moderate Waddell signs consistent with symptom magnification and illness behavior. Dr. Cenac reviewed the October 13, 1998 MRI report which was normal. (EX-8, p. 1). Dr. Cenac found no physical evidence of orthopedic mechanical dysfunction or neurological deficits. He opined no physical limitations are applicable and Claimant could return to "any level of employment that he was capable of performing prior to the alleged injury date." (EX-8, p. 2).

Dr. Randall D. Lea

Dr. Lea was deposed by both parties on February 5, 2001 and his records of Claimant were introduced into evidence. (EX-4; CX-3). Dr. Lea specializes and is board-certified in orthopedic surgery. (EX-4, pp. 4, 28). Dr. Lea examined Claimant at the joint request of Employer and Claimant. (EX-4, p. 5). Dr. Lea

first examined Claimant on April 13, 1999. At that time, Claimant complained of lower back pain and leg pain. (EX-4, p. 53; CX-3, p. 25). He noted tenderness in the L5-S1 area with equal bilateral measurements of Claimant's thighs and calves. (CX-3, p. 29). Positive straight leg raising tests bilaterally were noted. (CX-3, p. 30). Dr. Lea reviewed the lumbar MRI and found no abnormalities. (EX-4, p. 59; CX-3, p. 31). He diagnosed Claimant with a chronic lumbosacral sprain with radiculopathic symptom profile. He recommended diagnostic studies including a lumbar CT myelogram which he explained would show bony abnormalities more distinctly than an MRI. Additionally, Dr. Lea recommended EMGs and NCVs to determine the extent of any radiculopathic pain.

He opined if the foregoing studies are normal he "would be unable to support a post-traumatic musculoskeletal reason for Claimant's ongoing pain and inability to return to work. If the studies show problems, he recommended a choice of epidural steroids and/or selective nerve root blocks since, in his opinion, Claimant was not "a particularly good surgical candidate" based on the MRI. (EX-4, p. 60; CX-3, p. 32). In his deposition testimony, Dr. Lea explained once the EMGs, NCVs and neuro consult were conducted, if surgery was deemed unnecessary, then Claimant would be at MMI at that point, but if surgery was necessary, MMI would be six months to a year after surgery. (EX-4, pp. 15-16).

Dr. Lea determined Claimant was capable of sedentary to light activities and suggested that Claimant not lift more than ten pounds and lift no more than thirty percent of a workday, intermittently. Dr. Lea explained Claimant was capable of alternately sitting, standing, and walking every thirty to forty minutes of an eight hour workday and was allowed to drive for thirty to forty-five minutes at a time. Further, Dr. Lea opined Claimant could bend, twist, and turn through mid-range on an occasional intermittent basis during an eight-hour workday. Dr. Lea estimated that Claimant may reach MMI within nine weeks from that time. (EX-4, pp. 14, 61; CX-3, p. 33).

On August 11, 1999, Claimant returned to Dr. Lea complaining of continued pain. Dr. Lea again examined Claimant and determined there were no new findings and suggested the same restrictions as in his April 1999 report. He reviewed the recommended CT myelogram results which he considered "not particularly remarkable." The EMG and NCV suggested a left-sided L5-S1 radiculitis. (EX-4, pp. 62, 82; CX-3, p. 22).

Dr. Lea again saw Claimant on March 14, 2000. Upon examination, Dr. Lea found nothing new concerning Claimant's condition. He believed that Claimant had achieved maximum medical improvement. Dr. Lea disagreed with Dr. Blanda's recommendation for surgery, as Dr. Lea believed that there was little chance of alleviating Claimant's symptoms based on the diagnostic studies. In Dr. Lea's opinion, there was nothing more that could be done regarding treatment for Claimant's symptoms, except the possibility of pain management. Dr. Lea again determined Claimant was capable of sedentary to light activities and referred to his previous April 1999 report for Claimant's detailed capabilities. (EX-4, p. 63; CX-3, p. 21).

When deposed, Dr. Lea explained, based on the EMGs, it is possible that Claimant's pain could be caused by diabetic neuropathy. Despite questions about the cause of Claimant's pain, Dr. Lea opined that surgery would not alleviate Claimant's pain. (EX-4, p. 11). He opined that Claimant showed no signs of malingering or symptom over dramatization. (EX-4, p. 19).

Franklin Foundation Hospital Records

Records from Franklin Foundation Hospital were introduced as Claimant's Exhibit No. 9. Claimant was examined at the hospital on January 31, 1998. The records reflect he complained of neck pain and sustained mild neck trauma. The emergency room physician recommended Ibuprofen (800mg) for pain. Claimant was in "good" condition when released. (CX-9, pp. 2-3).

The Contentions of the Parties

Claimant contends he is temporarily totally disabled because he is unable to return to his previous job as an electronics technician and has been disabled since his lay off by Employer on August 21, 1998. Claimant contends he has not reached maximum medical improvement as he has not received the surgery recommended by Dr. Blanda.

Claimant further argues Employer/Carrier have failed to establish the availability of suitable alternative employment because Employer only identified a certain percentage of jobs that may exist within the sedentary work level. He contends nothing was done to actually assist him in identifying jobs that fell within Dr. Lea's restrictions. Likewise, he contends Employer has not demonstrated that it has offered or could offer

Claimant employment within his modifications. Further, Claimant asserts that if surgery is found reasonable and necessary, he is entitled to vocational rehabilitation following surgery. Thus, he contends he is still entitled to appropriate vocational rehabilitation and his benefits should not be reduced as of May 15, 2000.

Claimant contends his wages for the two months of his employment with Employer, a total of $7,063.00, should be used to calculate his average weekly wage, as these represent his wages at the time of the accident.

Claimant relies on treating physician Dr. Blanda's recommendations for medical treatment, as he believes they are reasonable and necessary and should be given more weight than the recommendations of the independent medical examination (IME) physician, who examined Claimant only once and later reviewed diagnostic studies. Claimant further contends the treating physician's recommendations should be given greater weight than Dr. Accardo's recommendations, as Dr. Accardo only saw Claimant shortly after the accident and has not reviewed any of his diagnostic studies.

Claimant contends there was no intervening accident which, as Employer/Carrier's contends, may have caused Claimant's disability, because the only accident occurred in January 1998, months before Claimant was employed by Employer.

Claimant contends there is nothing in the Act that supports Employer's contention that Claimant is precluded from receiving benefits under the Act because he has received unemployment benefits since being laid off by Employer.

Employer/Carrier contend Claimant does not require surgery and is able to return to work. They assert Claimant agreed to be bound by the diagnosis of the IME physician, Dr. Lea, who did not think that surgery was appropriate and who opined that Claimant is able to return to light-duty work.

They contend the collective opinions of Drs. Accardo, Daniels and Cenac establish that Claimant has always been able to return to work and does not require surgery. Further, they assert, according to Dr. Lea's testimony, Claimant's pain could be a result of diabetic neuropathy, and, thus, unrelated to the work-related incident.

Employer/Carrier contend they demonstrated the existence of suitable alternative employment because Employer identified available jobs for which plaintiff was qualified and able to perform, given his medical restrictions. They further contend suitable alternative employment was established by the testimony of vocational expert, Dr. Larry Stokes. They contend Claimant did not present evidence to refute any of Dr. Stokes' findings. Employer/Carrier contend given their evidence of suitable alternative employment and because Claimant has not shown a diligent search for and willingness to work, he cannot be totally disabled.

Employer/Carrier contend Claimant forfeited his right to receive benefits under the Act because following his lay off by Employer, he received unemployment compensation, stating in his application that there was no reason he could not work. They further contend Claimant was inconsistent because when he later applied for and was offered a job with Swift Ships, he represented that he had not been released for work by Dr. Blanda.

Employer/Carrier assert that there was an intervening and superceding cause which is the true cause of Claimant's current injury. Although the hospital records obtained by Employer/Carrier showed Claimant was involved in an accident in January 1998, they contend Claimant's testimony concerning the date of the car accident was sufficiently inconsistent to suggest there may have been a second accident in January 1999.

Employer/Carrier contend Claimant's average weekly wage is $710.06. They contend that because Claimant had worked for Employer for only two months, Claimant's 1997 salary from his previous employer should be used to calculate his average weekly wage. They contend this salary was $36,923.00, which, when divided by fifty-two weeks, results in an average weekly wage of $710.06.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly

balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

Based on the stipulations of the parties, Claimant's injury occurred on July 30, 1998 in the course and scope of his employment. However, Employer/Carrier argue that an intervening event, for which Employer/Carrier is not responsible, aggravated or exacerbated the injury of July 30, 1998. The burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or

indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is **unable to return to his regular or usual employment** due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

Claimant’s usual job as an electrician in the repair division at the Bollinger-Morgan City dry docks. He took care of all of the electrical equipment on the dry docks. Claimant also repaired machines in the machine shop. He credibly testified his job required lifting up to 100 pounds.

Dr. Blanda, Claimant’s treating physician, initially restricted Claimant from returning to any work. On July 1, 1999, he restricted Claimant from heavy work, such as Claimant’s former job. On September 21, 1999, Dr. Blanda placed Claimant on a no-work status.

The IME physician, Dr. Lea, upon whose opinions I have placed greatest probative value, consistently opined Claimant was capable of sedentary to light activities and suggested that Claimant not lift more than ten pounds and lift no more than thirty percent of a workday, intermittently. Dr. Lea explained Claimant was capable of alternately sitting, standing, and walking every thirty to forty minutes of an eight-hour workday and was allowed to drive for thirty to forty-five minutes at a time. Further, Dr. Lea opined Claimant could bend, twist, and turn through mid-range on an occasional intermittent basis during an eight-hour workday.

Given the specific requirements of Claimant's usual employment as an electrician, Claimant could not return to his job without restrictions. Thus, I find that Claimant was totally disabled when he was laid off by Employer on August 21, 1998, because he could no longer perform the duties of his former position as an electrician.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

Consistent with Dr. Lea's opinion regarding the results of diagnostic testing and a neurological consult, I find Claimant reached MMI on September 17, 1999. The EMG/NCV report from Dr. Hodges is dated June 24, 1999. Dr. Domingue conducted a neurological examination of Claimant on September 14, 1999 and issued a letter dated September 17, 1999, explaining that he had reviewed Claimant's MRI. Dr. Domingue did not recommend surgery. Thus, the latest date after all diagnostic tests and

the neurological consult is September 17, 1999, which I find to be Claimant's date of maximum medical improvement. Accordingly, I find that Claimant was permanently disabled after September 17, 1999.

For reasons discussed below, I find that Dr. Blanda's recommendation for surgery is unreasonable and unnecessary and thus, does not impact a finding that Claimant has reached maximum medical improvement.

C. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may

suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane, 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that "...It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

In evaluating the appropriateness of suitable alternative employment presented by Employer/Carrier, I will apply the recommendations and restrictions of Dr. Lea, whose opinion I credit. Dr. Lea determined that Claimant is capable of sedentary to light activities and suggested Claimant not lift more than ten pounds and lift no more than thirty percent of a workday, intermittently. Dr. Lea explained Claimant is capable of alternately sitting, standing, and walking every thirty to forty minutes of an eight hour workday and is allowed to drive for thirty to forty-five minutes at a time. Further, Dr. Lea opined Claimant could bend, twist, and turn through mid-range on

an occasional intermittent basis during an eight-hour workday.

Employer relies upon the vocational opinion of Dr. Stokes. I note that the generic descriptions of jobs prevalent in Claimant's residential area, such as, electronics technician, electronic parts sales representative, purchasing agent, inspector and stock control positions are not set forth in any specific detail. Since I cannot evaluate the appropriateness of these general jobs, by comparing the nature and terms of their description to Claimant's capabilities, I find that they do not constitute suitable alternative employment.

In his labor market survey dated June 7, 2000, Dr. Stokes identified an inside industrial rentals/sales position which he considered to be a sedentary position, involving mostly sitting but no lifting. Dr. Lea, whose opinion I credit, limited Claimant to alternate sitting, standing and walking for periods of thirty or forty minutes, which clearly is contrary to the postural demands of this position. Since this job does not comport with Claimant's capabilities, I find it is not suitable alternative employment for Claimant.

Dr. Stokes identified an electrical repair position, which he considered to be a light position, involving alternate sitting, standing, walking, and stooping. Specific lifting requirements for this position were not presented, yet as a light position, lifting requirements may be up to twenty pounds. Thus, as this job is not within Claimant's lifting restriction of ten pounds, I find it is not suitable alternative employment.

Dr. Stokes also identified an entry level computer networking technician, which he considered to be a sedentary to light position, involving alternate sitting and standing. No lifting is required. This position paid wages ranging from $10.00 to $15.00 per hour. As this job is within Claimant's lifting restrictions, as well as his sitting, standing and walking restrictions, I find that it is suitable alternative employment.

Dr. Stokes also identified a position as an electronics technician, which he considered to be a light to medium position, involving mostly sitting, with some standing. The maximum lifting required is 75 pounds, although accommodations could be made. Given Claimant's restrictions as to sitting, this job clearly exceeds the limitations placed on Claimant.

The required/accommodated lifting of 75 pounds may also be beyond Claimant's capabilities. Furthermore, Mr. Stokes explained that this position had been filled, and thus was no longer available. For these reasons, I find this job is not suitable alternative employment.

Dr. Stokes also identified a position as an administrative assistant (electronic), which he considered to be a sedentary job, involving mostly sitting but allowed for alternate positions as needed. Lifting for this position would not exceed five pounds. This position pays from $6.00 to $6.50 per hour. As the requirements of this position are within Claimant's restrictions, I find that this job is suitable alternative employment.

Given the foregoing discussion, I find and conclude that Employer/Carrier have established the availability of suitable alternative employment for Claimant within the local community. Having found the entry level computer networking technician and administrative assistant (electronics) positions to be appropriate for Claimant, I conclude Claimant's wage earning capacity to be $8.00 per hour ($10.00 + $6.00 ÷ 2 = $8.00) or $320.00 a week at 40 hours per week. Claimant has not demonstrated that he tried with reasonable diligence to secure such employment and was unsuccessful. Accordingly, I find that Claimant is permanently partially disabled and entitled to permanent partial disability benefits from June 7, 2000 based on a wage earning capacity of $320.00 per week.

D. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year

immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can[] reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Claimant worked as an electronics technician for 8 weeks for the Employer prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Citing 10(d), Employer/Carrier argue that Claimant's earnings during the year prior to the accident, during which Claimant was employed by Oceaneering, should be divided by 52 to determine Claimant's average weekly wage. Using this method of calculation, Employer/Carrier assert that Claimant's average weekly wage is $710.06 ($36,923.00 ÷ 52 = $710.06).

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

If Section 10(c) is applied, the primary concern is to determine a sum which reasonably represents the earning capacity of the injured employee. Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981).

In Miranda, the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury. (13

BRBS at 886).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra.

Claimant’s personnel records indicate that he began working for Employer on June 4, 1998 and was injured on July 30, 1998. (EX-9, p. 1). He worked for Employer for eight weeks before he was injured and returned to work after his injury for an additional three weeks until he was laid off on August 21, 1998. Thus, he worked a total of eleven weeks for Employer. Claimant’s personnel records from Employer (EX-9, p.1), as well as his W-2 form (EX-11, p. 9), show that he earned a total of $7,063.00 during his employment with Employer. Neither Employer/Carrier nor Claimant have presented any reason why these earnings do not represent Claimant’s wages over eleven weeks of his employment with Employer and reasonably represent his earning capacity at the time of his injury. Thus, I find that Claimant’s average weekly wage is $642.09 ($7,063.00 ÷ 11 = $642.09).

E. Medical/Surgical Benefits

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for Employer to be liable for Claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for Claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. See Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

In review of the medical records of the various physicians who have examined, diagnosed, and given recommendations for Claimant, I give the most weight to the diagnosis and recommendations of Dr. Lea, the independent medical examiner. In his opinion, surgery is unnecessary and would not be of benefit to Claimant in terms of alleviating Claimant’s pain.

Dr. Lea relies on the neurological conclusions by Dr. Domingue that Claimant is neurologically intact. Dr. Domingue also opined that Claimant’s condition could be caused by a diabetic peripheral neuropathy or a sciatic neuropathy. In light of the EMG and NCV studies, as well as the opinion of Dr. Domingue, Dr. Lea determined that, nothing more could be done for Claimant, other than pain management.

Dr. Daniels approved Claimant for regular work. Dr. Accardo

opined Claimant should return to work and to normal activities. Dr. Cenac, an orthopedic surgeon, opined in February 1999 Claimant should have no working restrictions.

Dr. Blanda is the only physician who has recommended surgery for Claimant. After reviewing the records of the physicians who examined and diagnosed Claimant, I find that Dr. Blanda's recommendation for surgery is unreasonable and unnecessary.

Concurrently with Dr. Blanda's treatment, Claimant was also seeking treatment from Dr. Nick Accardo. Their findings varied and posed discrepancies in opinions. On August 18, 1998, Dr. Accardo opined that Claimant could return to his normal work activities. Claimant was authorized a choice of his own physician and chose Dr. Blanda as his treating physician.

Claimant's first visit to Dr. Blanda occurred on September 24, 1998, three days after an exam by Dr. Accardo. Although both physicians noted lumbar tenderness, without spasm, Dr. Accardo found negative straight leg raises whereas Dr. Blanda detected positive straight leg raises. The variance in findings on straight leg raising continued through December 14, 1998, when Dr. Accardo last examined Claimant.

Contrary to Dr. Blanda's interpretation of Claimant's October 13, 1998 MRI, Dr. Laborde, from whom Dr. Blanda sought a second opinion of the July 1999 myelogram and CT scan, found the MRI to be a normal study with no evidence of any abnormality or disc bulge. In July 1999, Dr. Laborde opined, in retrospect, that the October 13, 1998 MRI revealed a "small central subligamentous disc protrusion or herniation without nerve root displacement." He noted the herniation had increased in size and was more prominent on the June 3, 1999 post-myelogram CT scan. Dr. Domingue confirmed the presence of a L5-S1 central disc herniation on the June 3, 1999 CT scan, but opined the nerve roots were not being compressed and that a decompressive surgical procedure would not be beneficial to Claimant. He further stated he had "no opinion" about a stabilizing fusion. Dr. Lea found the CT scan results "not particularly remarkable."

Contrary to Dr. Blanda's reported increased atrophy in Claimant's left calf, Dr. Domingue found "no wasting or weakness" in Claimant's lower extremities and Dr. Lea found equal bilateral measurements.

No other physician has recommended surgery for Claimant.

Drs. Accardo, Domingue and Lea opined that there is no evidence of spinal or foraminal compromise warranting a surgical procedure. Dr. Lea specifically disagreed with Dr. Blanda's recommended surgery since it had little chance of alleviating Claimant's symptoms in view of the diagnostic studies. Dr. Lea has recommended a choice of epidural steroids and/or selective nerve block therapy or pain management as a continued treatment modality. Dr. Blanda has not rendered an opinion regarding Dr. Lea's more conservative approach.

In view of the competing opinions rendered in this matter, and particularly the disagreement expressed by Drs. Accardo, Domingue and Lea with the surgery recommendation of Dr. Blanda, I find such recommendation to be unreasonable. Further, Drs. Domingue and Lea opined that a surgical fusion is unnecessary since it would not relieve Claimant's symptoms or be beneficial to Claimant. I so find.

F. Intervening and Superceding Event

Employer asserts an intervening and superceding event, namely a car accident, caused or aggravated Claimant's injury. I credit the records of Franklin Foundation Hospital which reflect the date of the car accident in which Claimant was involved to be January 31, 1998, not 1999. Although there are discrepancies in Claimant's testimony as to the date of the accident, in part caused by questions propounded to him, Employer has presented no evidence to show that the accident did not occur on this date. Moreover, speculation of another accident in 1999 is unfounded in the instant record. Thus, I find there was no intervening and superceding cause of Claimant's injury.

G. Unemployment Benefits - Waiver of Benefits under the Act

Employer has asserted Claimant's application and receipt of unemployment benefits from the State of Louisiana amounts to a waiver of his benefits under the Act. Employer asserts Claimant's representation in his application of his ability to work conflicts with his claim of disability. Although there is an apparent conflict, it is easily resolved. Claimant has shown he was unable to perform his usual work at the time he applied for unemployment compensation. Dr. Accardo informed Claimant that the best thing he could do would be to return to work. The fact that Claimant was able to draw unemployment benefits

supports an inference that no work within Claimant's capabilities was available. Employer has not presented evidence that work within Claimant's capabilities was available to Claimant at that time. Furthermore, Employer has presented no jurisprudence to support its position that Claimant's application and receipt of unemployment benefits precludes his receipt of benefits under the Act. To the contrary, the Board has held under similar circumstances, that Claimant's application for unemployment benefits and receipt of such benefits does not override substantial evidence that he is totally disabled and entitled to benefits under the Act. See Fargo v. Campbell Industries, Inc., 9 BRBS 766, 774 (1978).

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer has not paid Claimant any disability compensation. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[4] Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n.3 (1981).

Since Employer's notice of controversion filed on October 9, 1998 was not filed within 14 days after compensation became due on July 30, 1998, and since the District Director has made no determination that Employer's failure to comply with Section 14(e) was beyond its control, I find Claimant is entitled to a 10% penalty. This penalty began accruing the first day on which Employer could have filed a timely notice of controversion (August 27, 1998), 28 days after receiving notice of Claimant's injury on July 30, 1998 and tolled when Employer actually filed it notice of controversion on October 9, 1998.

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[4] Section 6(a) is not applicable since Claimant suffered his disability for a period of more than fourteen days.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES[5]

No award of attorney's fees for services to the Claimant is

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[5] Counsel for Claimant should be aware that an attorney's fee award by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when the informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **July 20, 2000**, the date the matter was referred from the District Director.

made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from July 30, 1998 to September 17, 1999, based on Claimant's average weekly wage of $642.09, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from September 18, 1999 to June 6, 2000 based on Claimant's average weekly wage of $642.09, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from June 7, 2000 and continuing based on two-thirds of the difference between Claimant's average weekly wage of $642.09 and his reduced weekly earning capacity of $320.00 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 1999, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's July 30, 1998, work injury, pursuant to the provisions of Section 7 of the Act.

6. Employer shall be liable for an assessment under Section

14(e) of the Act.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 26th day of October, 2001, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge